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ABSTRACT

The paper addresses ways in which litigation serves a role in the reform of services for mentally disabled children and adults. Effects on deinstitutionalization are emphasized. Benefits of using litigation to secure the rights of mentally retarded persons include public awareness, quality assurance standards for institutions, and the development of new programing strategies. Drawbacks to litigation are also reviewed, including disproportionate allocation of resources into institutional programs; bureaucratic resistance to reforms required by court rulings; polarization of interests, especially among parents and personnel; and legislative backlash. The paper concludes with an analysis of some factors affecting the future of litigation in the field of mental disabilities, notably a diminished willingness to consent and increasing financial pressures and the effect of austerity. Five suggestions for reformers are offered, including pursuing rights based on highly definite legal rules rather than on more open-ended provisions and increasing recruitment of paraprofessionals in public law practice. (CL)

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FACTORS AFFECTING COMPLEX LITIGATION *

By

Valerie J. Bradley

From the vantage point of the early 1980's, it is possible to look more critically at litigation and to draw some conclusions regarding both the benefits and costs of bringing in judges to superintend state mental disabilities systems. In addition to shedding light on the efficacy of legal reform strategies, this exploration also provides a unique perspective from which to view deinstitutionalization. Because litigation has reached into almost every corner of the service system, it has brought many policy issues into strong relief.

Further, an assessment of the efficacy of litigation helps to isolate those instances where litigation may be the only way to bring about desired results, and those instances where other strategies would suffice or are even preferable.

The purpose of my paper is to indicate some of the ways that litigation can be viewed and to begin the dialogue regarding the role of litigation in the reform of services for mentally disabled children and adults. Specifically, I would like to talk about the following: 1) the benefits of litigation, 2) the costs of litigation, and 3) the future of litigation in the field of mental disabiliities.

Litigation: The Benefits

As a general matter, there are two major benefits to the use of litigation to secure the rights of devalued groups--it removes the debate regarding the virtues of improving the lot of powerless minorities from the political arena and places it in the more insulated forum of the courts, and it reinforces the moral as opposed to practical and expedient aims of the mental disabilities delivery system. However, what are the concrete gains?

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First, one of the major benefits is the illumination of the problems and needs of more seriously handicapped persons. Because of the severity of the disabilities of many of the plaintiffs in broad scale suits and their virtual invisibility, it is safe to say that without the pressure created by litigation, their plight might only have been partially ameliorated.

Even when suits have not been totally successful, many would argue that the presence of litigation has served as a catalyst for change. The fact that most of the major suits in the field have not been fully litigated, but have been settled by consent agreement, underscores the power of litigation to frame issues and to influence political decision-making.

A second area in which litigation has resulted in at least temporary gains is quality assurance. As a means of protecting the rights of individual plaintiffs, many remedies have included provisions for individualized habilitation or education plans. These plans have been a key ingredient in institutional improvement, deinstitutionalization and right to education cases. The requirement for individualized planning has subsequently been included in federal statute and regulation--specifically in the provisions of PL 94-142 and the Title XIX regulations for intermediate care facilities for the mentally retarded (ICF/MRs).

Right to treatment suits in particular have reinforced the legitimacy of externally-developed staffing standards for institutional settings. The inclusion of such standards has not only made compliance easier to measure, but it has also given credence to the assumption that state institutions should be judged by the same professional standards to which community-based and private facilities must adhere.

Further, remedies that envision significant deinstitutionalization in many instances include review by the court-appointed compliance officer of placement plans. To carry out these duties, court masters have developed guidelines for the preparation of IHPs and internal criteria for plan approval.

In addition, some masters and monitors are responsible for monitoring the quality of community living arrangements. In the Pennhurst case, for example, staff of the Office of the Special Master were required by the court to monitor the quality of all community living arrangements in which class members resided. Some of the monitoring, which is now the responsibility of the state , has been extended to facilities beyond those serving class members, and the individual client monitoring is likewise rapidly expanding beyond the more narrow target group.

Similarly, litigation has given the families of mentally disabled persons a formal role in decision-making regarding placement of their family members. In Pennhurst, the court has required that families be involved at all stages of the placement process. In the Wuori v. Zitnay consent decree in Maine a consumer panel was established to assist the court in monitoring compliance. In other suits, parent appeal rights and participation in planning have become routine.

Third, litigation in many states has provided the external pressure required to give reformers within the system the tools to bring about change. Some state mental retardation officials have suggested that their willingness to enter into consent agreements was motivated by their desire to further their own programmatic aims.. A specific example is the Wuori case in Maine. In that state, the consent agreement was seen by many in the system as a

vehicle to accomplish desired change and as a means of obtaining necessary financial resources from other state agencies and from the legislature.

Finally, by forcing service systems to respond to the needs of new populations or to create alternative services court decrees have indirectly compelled the generation of new programmatic resources and strategies. For instance, in Pennsylvania, there was real concern among providers that the existing service system--which until then had served more moderately and mildly retarded persons--would be unable to cope with the special needs of severely and profoundly retarded persons coming out of Pennhurst. Over time, however, most of those involved with the implementation of the decree would agree that providers were able to build the capacity to provide appropriate services.

Research on the progress of former Pennhurst residents now living in the community tends to bear out the fact that community based programs have found successful ways of addressing the multiple needs of these individuals. An analysis conducted by Jim Conroy and his colleagues at Temple University of the characteristics of matched comparison groups--one group that stayed at Pennhurst and another group of "twins" that moved to the community--showed that over a two year period, those living in community facilities showed significant growth in adaptive bahaviors compared to those who stayed behind.

By moving disabled children and adults into the mainstream of the public school classroom and into residential neighborhoods, litigation may also have helped to improve attitudes regarding persons with disabilities. In a survey of the neighbors of

community living arrangements housing former Pennhurst residents, researchers at the Institute for Survey Research at Temple University found that, after an increase in negative feeling immediately after the residence opened, community members came to accept the retarded residents.

Litigation: The Costs

Now, what are some of the drawbacks to litigation?

First, some litigation has resulted in a major diversion of resources into institutional programs. For instance in the Willowbrook litigation, upwards of $100 million has been invested in the institution. Some would argue that even though this staggering infusion of resources has resulted in improvements in the facility, serious deficits still remain.

This disproportionate allocation of resources points to another major negative side effect of litigation--the creation of a special class of individuals who, by virtue of the resources devoted to their needs, are "worthier" than other similarly handicapped individuals in the state.

A further cost of litigation is bureaucratic resistance. Because complex litigation requires significant restructuring of bureaucratic practice, the ways in which the bureaucracy views such reforms is key to the ultimate success or failure of the court's intervention. As state officials become increasingly angry about the "interference" of the courts in policy-making, there is a danger that they will also become more resistant to the directions dictated by decrees--even if such directions are consistent with their goals for the mental disabilities system. This seeming perverseness can be explained

in part by the fact that organizations, like organisms, resist change at some level in order to preserve their integrity and the regularity of their operations. Resistance is certainly the course chosen by the defendants in Pennhurst--the only suit in this field that will have been heard by the Supreme Court not once, but two times.

At times, this resistance has even taken on a somewhat perverse character. For instance, as placement out of Pennhurst slowed to a trickle, the Office of Mental Retardation implemented plans in other parts of the state to close a 250 bed state facility and to phase out a large mental retardation unit at a state hospital.

If more and more state bureaucrats show their disdain for the court's presence by resisting compliance, the difficulties that the judiciary has in enforcing compliance will become more apparent and the moral suasion that courts have been able to exercise in complex suits may be diminished.

A third cost is polarization of interests. As discussed earlier, litigation has the power to mobilize previously disparate individuals into political coalitions. In some cases, however, the "mobilization effect" acts to drive wedges in existing coalitions and to create antagonism and animosity.

The Pennhurst litigation in particular appears to have exacerbated tensions among the parents of mentally retarded persons in Pennsylvania. Because of the frank deinstitutionalization character of the remedy, some pro-institution parents felt compelled to take sides and ultimately formed a separate organization and became intervenors on the state's side of the litigation. Given the community orientation of the Office of Mental Retardation in

Pennsylvania, this polarization may have occurred in any event, but certainly not as quickly nor as intensely.

Litigation has also activated employee unions in those states where consent decrees have mandated significant deinstitutionalization. In Pennsylvania, the American Federation of State, County and Municipal Employees (AFSCME) is a significant actor in the policy arena surrounding the mental retardation system in the state. The intensity of AFSCME's activities definitely increased once the community-oriented character of the Pennhurst decree became clear.

The final cost is legislative backlash. One of the major constraints faced by judges in the enforcement of complex decrees is their lack of power to reach through the bureaucracy to the state legislature which is ultimately responsible for providing funds for the reform.

The legislature is pivotal to the successful implementation of consent decrees and court orders. During the 1970's, most legislators were willing to be guided by the advice of state program officials--many of whom were sympathetic to the aims of litigation in their states. However, as judicial intervention continued, some legislatures began to assert their independence. In the Willowbrook case, the legislature refused to appropriate funding for the Review Panel.

In Pennsylvania, the state legislature cut the budget of the Pennhurst Special Master from $900,000 to $35,000 and barred the executive branch from exceeding the limit it had set. In Massachusetts, the Chairman of the House Ways and Means Committee has formed a special committee to assess the impact of the court's

intervention and to explore the state department's management of the funds provided by the legislature to meet the requirements of the decree.

Whether legislative antipathy toward the court will be carried over to non-judicial reforms is not clear. What is clear is that legislators are increasingly concerned about an erosion of their prerogatives as a result of court intervention and are more and more willing to do something about it.

Litigation: The Future

1. Diminished Willingness to Consent

Of cases brought in the last few years, more are going to trial, and consent agreements are more aggressively negotiated by the defendants. Attorneys general around the country are in relatively close communication regarding litigation strategies and in 1981, several state attorneys general submitted an amicus brief for the defendants in the Romeo v. Youngberg case. Some of the state officials who signed the brief were from states where cases had been settled.

Further, though the ruling in the Supreme Court on Pennhurst was limited to one aspect of the Developmental Disabilities Act, there is some reason to suspect that federal courts may be less willing to grant the sweeping relief seen in many earlier cases. The Court's conservative ruling in Romeo--while it did support the constitutional rights of institutionalized mentally retarded persons--will almost certainly send a signal to federal district courts that judicial intervention to restructure mental disabilities systems will not be upheld.

2. Increasing Financial Pressures/Effect of Austerity

The growing resistance to federal court intervention is also strongly influenced by the gloomy financial picture emerging at the federal level and in several states. As long as resources were relatively flexible, there was enough "play" in the system to accommodate comprehensive consent agreements. As resources become short, meeting court requirements may be accomplished at the expense of expansion or improvement in other parts of the system.

Further, those states that have certified a significant number of institutional beds for Title XIX reimbursement may resist court-mandated deinstitutionalization unless they can be assured that the Title XIX funds will follow the clients into the community. In states where there is an aggressive ICF/MR program in the community, this shift may be accomplished with no substantial loss to the state treasury. However, in states where community programs are funded primarily with state dollars, deinstitutionalization may result in a direct loss of federal funding and a concommitant drain on scarce state funds.

Reform Strategies in the 1980's

For the time being, it is highly unlikely that there will be any dramatic break-throughs in securing additional constitutional rights for mentally disabled persons. This fact, coupled with the hard realities just described, means that litigators and others will have to explore alternative strategies. In conclusion, I have a few speculations regarding possible strategies:

1. Reformers may begin to target suits on discrete system problems, in order to garner publicity and attention to the issue,

while simultaneously implementing extra-judicial strategies.

2. Litigators, given the uncertain state of the case law, may be more likely to pursue rights based on highly definite legal rules rather than on more open-ended provisions.

3. The choice to litigate textual or statutory entitlements as opposed to the more debatable claims growing out of constitutional interpretation, may lead to more suits in state courts. Since many of the major federal statutory programs have now disappeared in the wake of budgetary block grants, state laws will become a central source of direction for the mental disabilities system. It may also be that litigators will use state courts to pursue more open-ended entitlements based on state consitutions.

4. The time and resources involved in bringing a case to trial and potentially through the appeals process are significant. Clients or plaintiffs--or their next friends--may become more concerned about the risks of continued litigation and impatient for solutions. The result may be growing pressure from plaintiffs for settlement.

5. Given a reduction in legal services funding and intensified competition for other funding to support litigation, manpower in the public interest law community is likely to diminish. Thus, recruitment of paraprofessionals in public law practice may increase and a diversion of resources to more repetitive, client-centered tasks, such as representation at administrative hearings, may result.

Conclusion

Litigation is clearly responsible for major improvements in the lives of mentally disabled persons. However, in the absence

of authorative reaffirmation of the legal theories that underpin public law cases in this area, the pace of broad-based suits brought in this country may slow considerably. In those instances where litigation continues to be pressed, warning signals such as reluctance to consent and growing legislative resistance should be heeded. Given these realities, now should be the time to consolidate and enforce the direct and indirect gains of public law litigation. The appeal to broad principles made in the 1970's should be followed by concrete and concentrated efforts at implementation. The armamentarium of those who continue to seek change, therefore, cannot be limited to one tactic, but must include multiple judicial and extra-judicial strategies.